by the mere fact that he produces it . . ." and a document produced in court is regarded as evidence under the Act. Secondly, the definition was based on the *dicta* of two Indian Supreme Court decisions, namely, *M.P. Sharma* v. *Satish Chandra,*(5) and *the State of Bombay* v. *Kathi Kalu.*(6) These two cases dealt with offences under the Indian Penal Code. The main issue raised in those two cases was the question of the protection of an accused person as a witness under article 20(3) of the Indian Constitution. The two Indian decisions cannot, therefore, form the basis of a definition of the word "witness" in section 132 of the Act.

In my opinion, a witness, in the context of section 132 of the Act, is a person who testifies on oath or affirmation in a court of law or in a judicial tribunal. He is subject to examination in chief, cross-examination and re-examination. See section 138 of the Evidence Act. The examination of the witness must be done orally and in open court. See Order 38 rule 1 of the Rules of the High Court, 1980. As already stated, a person who merely produces a document in court is not a witness and he may not be cross-examined unless he is called as a witness. [Section 139].

On the other hand, when a person is served with an *Anton Piller* order, he is only required to give discovery of the relevant documents to the plaintiff's solicitors. He is not required to take an oath or affirmation before the plaintiff proceeds with the discovery of the documents. He is not subject to cross-examination or re-examination. Therefore, a person giving discovery of documents pursuant to an *Anton Piller* order does not fall within the meaning of the word "witness" in section 132 of the Evidence Act. In other words, section 132 does not apply at all to discovery in respect of an *Anton Piller* order. Thus, it is not correct to say that the doctrine against self-incrimination as laid down in the *Rank's* case had been withdrawn in this country by section 132 of the Act.

In my judgment, the principle laid down in the *Rank's* case applies in the instant case. The defendants are, therefore, entitled to the privilege not to give discovery of documents, the disclosure of which would incriminate them.

For the reasons stated above, the *Anton Piller* order granted on December 30, 1982, is now discharged. The plaintiff will pay the costs of this application to the first, second, sixth and seventh defendants.

Order accordingly.

Solicitors: *Raja Nayagam & Co.; Norila, Ravinthran & Partners.*

SAHADEVAL v. LEMBAGA PELABOHAN KELANG

[O.C.J. (Siti Norma Yaakob J.) August 27, 1984]
[Kuala Lumpur — Civil Suit No. P. 450 of 1981]

Administrative Law — Date of retirement — Computation — Reliance on date of birth in record of service — Dispute as to correctness of record — Whether plaintiff had been prematurely and unlawfully retired before age of 55 years.

Employment — Retirement age 55 years — Computation — Reliance on date of birth in record of service — Dispute as to correctness of record.

The plaintiff was born in India. On December 22, 1952 he joined the Malayan Railway as a ganger. In 1963 he opted to join the defendant. On January 15, 1975, all employees of statutory authorities were given an option to convert to a new scheme of service under the Harun Report which contains terms relating to a new revision of salary as well as introducing for the first time pension rights to employees like the plaintiff. The plaintiff who elected to be placed under this new salary scheme was accordingly employed. By exercising this option he had bound himself to be governed by the terms and conditions of Service Circular 1/75. Under this circular the defendant acted to retire the plaintiff from its service.

The defendant required the plaintiff to retire on December 31, 1979 from his service with the defendant on the ground that the plaintiff had already attained the compulsory age of retirement, i.e. 55 years, on that date. For the purpose of computing his age, the defendant had relied on the date of birth stated in the plaintiff's record of service, AB 1, to which the plaintiff had affixed his thumb print.

The plaintiff alleged that his date of birth in AB 1 had been wrongly recorded and when he affixed his thumb print, the contents of AB 1 were never explained to him and as he could not read or understand English, he did not know that his thumb print had the effect of signifying the correctness of all particulars recorded in AB 1. He claimed that his correct date of birth was June 7, 1928 and not December 31, 1924 as stated in AB 1 and as such he had been prematurely and unlawfully retired on December 31, 1979 as on that date he had not yet reached 55. As proof of this, he submitted copies of his identity card, Employees' Provident Fund Card, citizenship certificate and a statutory declaration which all state the date of his birth as June 7, 1928.

The plaintiff sent a photostat copy of what he claims to be his original birth certificate issued from India (P.4) to

the defendant. However, the Public Services Department, to which the matter was referred, did not accept it as it was only a statement of the date of birth and as such was not a birth certificate. Another document titled Birth Certificate (P.5) was subsequently submitted to the defendant together with a certification (P.6) from the High Commission of India in Kuala Lumpur that both P.4 and P.5 were genuine official documents. The defendant rejected it as it was not verified in the manner required by paragraph 5 of Service Circular 29/77.

The plaintiff brought the present action seeking (1) declaration that he was born on June 7, 1928 and that he had been prematurely and unlawfully retired before he reached 55 years and (2) re-instatement to his lawful and substantive employment from January 1, 1980 or alternatively damages for loss of service calculated on his monthly income with annual increment, losses in pension, leave, overtime and other allowances that were due to him during the period that he should be allowed to serve the defendant.

Held, dismissing the action: (1) there is no evidence that the error if there had been one, had been occasioned by the recording officer and since the plaintiff had affixed his thumb print on AB 1, he could not then turn around and say that he was not aware of the contents of AB 1;

(2) P.4 or P.5 should have been verified by the Malaysian High Commission in India. Since the plaintiff had failed to do so, the defendant had not been wrong in rejecting P.4 and P.5;

(3) since the date of birth in AB 1 had not been amended, the defendant could rely on it when computing the plaintiff's retiring age.

Cases referred to:

(1) *General Manager Keretapi Tanah Melayu* v. *Verriah* [1975] 1 M.L.J. 123.

(2) *Doraisamy* v. *Government of Malaysia* [1982] 2 M.L.J. 155.

CIVIL SUIT.

A.K. De Cruz for the plaintiff.

Zainuddin Ismail for the defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J.: In this case the defendant required the plaintiff to retire on December 31, 1979 from his service with the defendant on the ground that he, the plaintiff, had already attained the age of 55 years (the compulsory age of reitrement) on that date. For the purpose of computing his age, the defendant had relied on the date of birth stated in the plaintiff's record of service, AB 1, to which the plaintiff had affixed his thumb print. The plaintiff alleges that his date of birth in AB 1 had been wrongly recorded and when he affixed his thumb print, the contents of AB 1 were never explained to him and as he could not read or understand English, he did not know that his thumb print had the effect of signifying the correctness of all particulars recorded in AB 1. He maintains that his correct date of birth is June 7, 1928 and not December 31, 1924 as stated in AB 1 and as such he had been prematurely retired on December 31, 1979 as on that date he had not yet reached 55. Following his calculation based on his correct date of birth, he would only attain 55 on June 7, 1983. Upon that reckoning, he brings this present action seeking

(1) declarations that he was born on June 7, 1928 and that he had been prematurely and unlawfully retired before he reached 55 years and

(2) re-instatement to his lawful and substantive employment from January 1, 1980 or alternatively damages for loss of service calculated on his monthly income with annual increments, losses in pension, leave, overtime and other allowances that were due to him during the period that he should be allowed to serve the defendant.

The plaintiff was born in India and upon arriving in this country he joined the Malayan Railway as a ganger on December 22, 1952. Upon the formation of the defendant in 1963, employees from the Malayan Railway were given an option to either stay with the Malayan Railway or join the defendant and the plaintiff opted for the defendant. On January 15, 1975, all employees of statutory authorities were given an option to convert to a new scheme of service under the Harun Report which contains terms relating to a new revision of salary as well as introducing for the first time pension rights to employees like the plaintiff. Quite naturally the plaintiff elected to be placed under this new salary scheme and since he had already fulfilled the necessary requirements, he was accordingly emplaced in the pensionable scheme. By exercising this option, the plaintiff had also bound himself to be governed by the terms and conditions of Service Circular 1/75. Since this Circular did not contain any service regulations, paragraph 177 of the Circular empowered the defendant to make their own rules and regulations. As the defendant did not make any rules and regulations regarding changes in the dates of births of their employees, by a resolution, they adopted to be bound by the General Order Chapter A paragraph 68.

It was also under Service Circular 1/75 that the defendant acted to retire the plaintiff from its ser-

vice and on December 11, 1978, wrote AB 20, duly informing the plaintiff that he would be retired on December 31, 1979 as on that date he would have reached the compulsory age of 55 years. On receipt of AB 20, the plaintiff replied by sending AB 21 wherein he pointed out that he could not possibly be 55 on December 31, 1979 as he was born only on June 7, 1928 and that the date of his birth stated in his record of service, AB 1, was wrong. As proof of this, he submitted copies of his I.C., E.P.F. card, citizenship certificate and a statutory declaration which all state the date of his birth as June 7, 1928. With such documentary proof, he requested that the date of birth in his record of service be amended accordingly. To this request, the plaintiff was asked in AB 26 to submit his original birth certificate from India. In doing so, the defendant was acting pursuant to Service Circular 29/77 that governs the procedure for requests made by employees to have their dates of birth amended in their records of service.

Upon receipt of AB 26, the plaintiff sent a photostat copy of what he claims to be his original birth certificate issued from India, P 4, to the defendant. He also testified that the Indian authorities do not issue birth certificates but he had, when applying for an Indian International passport seen particulars of his birth recorded in a book kept by the office responsible for keeping such records. With P 4, the defendant referred the matter to the Public Services Department (AB 29), the authority who has the final say in matters of this nature. The Public Services Department accordingly replied that P 4 was not acceptable as it was only a statement of the date of birth and as such was not a birth certificate or a document which could be equated to a birth certificate. Following this, the defendant, in an effort to assist the plaintiff and acting pursuant to paragraph 5 of Service Circular 29/77 (AB 17), sent P 4 to the Malaysian High Commission in India with the request to verify it. From the correspondence, it is clear that the Malaysian High Commission in India referred the matter to the Home Department Madras who in turn sought the verification from the local office that issued P 4. The report on P 4 that was eventually relayed to the defendant was that the last sentence of P 4 which reads "His date of birth is 7-6-1928" had been added subsequent to the issue of P 4 as the office copy of P 4 did not contain that very important sentence. As P 4 could not be verified, the defendant had no alternative but to retire the plaintiff on December 31, 1979. Subsequent to this, on February 25, 1980, the plaintiff's solicitors submitted another document titled Birth Certificate, P 5, to the defendant together with a certification, P 6 from the High Commission of India in Kuala Lumpur that both P 4 and P 5 are genuine official documents. As P 5 was not verified in the manner as required by paragraph 5 of Service Circular 29/77, the defendant also rejected it.

The facts of this case are in no way disputed and the only issue before me is whether the defendant had been wrong in rejecting both P 4 and P 5 when considering the plaintiff's request to amend the date of birth in his record of service for the purpose of computing his age of retirement. It is not disputed that the plaintiff had a right under paragraph 68 General Orders Chapter A to apply for an amendment to the date of birth in his record of service as he was appointed before February 1, 1957. The procedure for the exercise of this right is in turn governed by Service Circular 29/77 which sets out the requirements when such a request has been made by an officer to his Head of Department. The Head of the Department must first be satisfied that the officer requesting for the amendment belongs to the category of officers who are qualified to make such a request in the first place. The request must also be supported by an original birth certificate, and in the case of a birth certificate issued outside Malaysia, this must be verified by our Malaysian Embassy in the country where the birth certificate originated. If the request is not supported by an original birth certificate or with a foreign birth certificate but without the necessary verification, the Head of the Department can, at that stage, reject the application without doing more. If the request is supported by the original certificate or with a foreign birth certificate and the necessary verification, the Head of the Department, shall submit these documents together with a statement of the officer's record of service and the Head of Department's comments, to the Service Section of the Public Services Department who will accordingly decide to allow or disallow the amendment asked for.

In this case, P 4, the so-called birth certificate that was issued by the Indian Authorities could not be verified as being authentic by the office that issued it, as the date of birth stated in P 4 had been added subsequently. In this respect, the defendant went out of their way to accommodate the plaintiff by referring P 4 to the Malaysian High Commission in India for verification, as under Service Circular 29/77, such verification must be sought for by the plaintiff himself and submitted to his Head of Department when requesting for an amendment to his date of birth in his record of service. In rejec-

ting P 4, the defendant was not acting contrary to what had been stipulated for in paragraph 5 of Service Circular 29/77 as the application was not supported by the necessary verification. On the same token, the defendant could not possibly accept P 5 as being the plaintiff's original birth certificate as no attempt had been made by the plaintiff to seek its verification from our High Commission in India. The plaintiff cannot substitute the verification from our own High Commission in India by another verification from the High Commission of India in Kuala Lumpur as that would be contrary to the procedure laid down by paragraph 5 of the Service Circular. The plaintiff also cannot hide behind the fact that he was not aware of the requirements of the Circular as he had made reference to it in his letter, AB 27, to the defendant.

Counsel for the plaintiff disputed the fact that Service Circular 29/77 is applicable to the plaintiff as the defendant should have made their own rules and regulations governing the procedure to be adopted when dealing with applications for amendments to dates of birth in the records of service. For that matter he maintains no reliance can be placed on the resolutions adopted in D7 as they were passed after this dispute arose. The defendant admits it did not make its own rules and regulations governing its own employees on service matters but had instead, at a meeting held on June 28, 1977, decided to adopt all the terms and conditions of service stipulated in Service Circulars 1/75, 29/77, their own service rules 1965, the General Orders and Treasury Circulars. This is evidenced by D 7 dated 23/5/84 which is an extract of the minutes of the meeting relating to the resolutions that was adopted on 28/6/77. That being the case, there is therefore no foundation for the plaintiff's contention that the resolutions were adopted after this dispute arose. Since on the one hand the plaintiff is seeking to take advantage of a right made available to him under the General Orders, the procedure for which is in turn governed by a Service Circular, he cannot on the other hand object that the procedure for the exercise of such right is not applicable to him.

Two cases, *General Manager Keretapi Tanah Melayu* v. *Verriah*[1] and *Doraisamy* v. *Government of Malaysia*[2], were cited to me where the facts were similar to the facts of the case before me and where the Federal Court confirmed that the date of birth to be adopted for the purpose of computing a person's retirement age is the date of birth recorded in his record of services unless the Director General of the Public Services approves that the recorded birth date be amended. Counsel for the defendant had argued that in both the cases cited, the dates of birth had been erroneously declared by the persons seeking to amend the errors whereas in the case before me, the error was not occasioned by the plaintiff himself but by the officer who made the entry in the record of service. There is no evidence that the error, if there had been one, had been occasioned by the recording officer and since the plaintiff had affixed his thumb print on AB 1, he cannot now turn around to say that he was not aware of the contents of AB 1. As such I do not consider it to be an ambiguous document. I also consider that it is quite immaterial as to who had occasioned the error as whichever way one looks at it, such an error, if there had been one, can still be corrected if the proper procedure is adopted. In the case before me that procedure is laid down by Service Circular 29/77 wherein all the plaintiff need do was to have P 4 or P 5 verified by our own High Commission in India. Since he had failed to do so, I had held that the defendant had not been wrong in rejecting P 4 and P 5. Since the date of birth in AB 1 has not been amended, the defendant can rely on it when computing the plaintiff's retiring age.

For these reasons, I had accordingly dismissed the action with costs.

Action dismissed.

Solicitors: *A.K.J. D'Cruz & Co.; Tunku Zuhri Manan & Abdullah.*